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No. 84-888 and No. 84-899

In The

Supreme Court of the United States

October Term of 1984

No. 84-888

DR. CHARLES McDANIEL, et al.,
Petitioners,

v.

GEORGIA ASSOCIATION OF RETARDED CITIZENS, et al.,
Respondents.

No. 84-899

THE BOARD OF PUBLIC EDUCATION FOR THE CITY OF SAVANNAH AND THE COUNTY OF CHATHAM, et al.,
Petitioners,

v.

GEORGIA ASSOCIATION OF RETARDED CITIZENS, et al.,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Does the Education for All Handicapped Children's Act of 1975, as amended, require the individual consideration of the duration of a child's educational program?

2. Does the requirement that children be individually considered for the duration of their special education and related services conflict with this Court's decision in *Board of Education of Hendrick Hudson Central School District v. Rowley,* 458 U.S. 176 (1982)?

3. May a private litigant and certified classes maintain class claims under the Education for All Handicapped Children's Act, as amended, if that named representative has exhausted all administrative remedies and if further exhaustion is futile?

4. Is the requirement under the Education for All Handicapped Children's Act of 1975, as amended, that individual programs based on unique needs be provided handicapped children sufficiently unambiguous so that the required consideration of duration of services does not conflict with *Pennhurst State School v. Halderman,* 451 U.S. 1 (1981)?

5. Must an appellate court dismiss a certified class action, if after judgment the individual claim of one of the class representatives is mooted against one of the defendants but the individual and class claims against other defendants remain actual controversies?

6. Under the Education for All Handicapped Children's Act as interpreted by this Court in *Board of Education of Henry Hudson School District v. Rowley,* 458 U.S. 176 (1982) does a procedural violation against an entire class of children constitute an injury so that a court is presented with a case in controversy under Article III of the Constitution?

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JURISDICTION

Respondents do not believe that any of the considerations under Rule 17 of the Supreme Court have been met.

The circuits are not in conflict concerning the consideration of the duration of a child's program under the

Education for All Handicapped Children's Act. The Second, Fifth, Seventh and Eleventh Circuits all agree that handicapped children under that act should be considered for services beyond 180 days of school. Moreover, the Eleventh Circuit Court of Appeals in the instant case has correctly applied the rulings of this Court. Finally, the limited relief minimizes the questions concerning the rule of the judiciary and thus the magnitude of the federal questions. This Court should deny the discretionary review requested.

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STATEMENT OF THE CASE

A. Factual Summary

The trial court fully described the nature of the instant case in *Georgia Association of Retarded Citizens v. McDaniel,* 511 F.Supp. 1263, 1265-1266 (N.D. Ga. 1981) (hereinafter "GARC") and respondents adopt that statement.

In summary, this class action addressed the arbitrary denial of educational services of appropriate duration to mentally retarded children. The petitioners seek review of a decision that the Education of All Handicapped Children's Act of 1974, P.L. 94-142, 20 U.S.C. § 1401 *et seq.*, as amended (hereinafter "Act" or "EHA") requires the consideration of the need for educational services in excess of 180 days a year during a review of the child's "appropriate education".

The petitioners Board of Public Education for the City of Savannah and County of Chatham, *et al.* (herein-

after "local defendants") and Dr. Charles McDaniel and the State Board of Education for Georgia[1] (hereinafter "state defendants") neglected to summarize several aspects of the evidence and proceedings below in their petition. Thus an addition to their statements is necessary.

Prior to the September 1, 1978 enforcement date in the EHA, Russell Caine and hundreds of members of the Georgia Association for Retarded Citizens (hereinafter "Association") had been absolutely denied access to public school services. Some had received "training" in social service training centers or institutions. Others had been provided no services at all. It is undisputed that due to the known needs of retarded children, the duration of the training programs which existed was for eleven and-a-half months. *GARC,* 511 F.Supp. at 1267. Nevertheless, it is also undisputed that the training programs were of inferior quality and provided by uncertified teachers. *Id.*

On March 3, 1978 Mr. and Mrs. Caine, the named plaintiffs in the instant action, attended an "IEP" conference concerning their son's movement from a training program into a public educational facility. At that time the duration of the school program for all children was already planned and specifically limited to 180 school days. At that time Russell, despite the requirements of the EHA had not been evaluated by the local defendants. The duration of his IEP was set due only to the policy of restricting educational services to programs of 180 days for mentally retarded children. *Id.* at 1268-69. The duration was not based on his individual needs and it was not based on any choice of educational theories.

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[1]Two separate sets of defendants have filed petitions for certiorari. These have been docketed as 84-888 and 84-899. Respondents file this single brief in opposition.

The Caines appealed the placement decision in April, 1978 under the Act and also asserted jurisdiction under Section 504. During the administrative process the local defendants offered the testimony of executive administrative officials of the State Department of Education. The testimony demonstrated that they were aware that a child could require more than 180 days of services in order to provide him/her with a "free appropriate public education". At the administrative stage they testified that they had no policy on the 180-day issue. They further testified that though they knew such services may be necessary, they had provided no planning, no funding and taken no steps to assure that such services were considered or provided handicapped children.

Later in the case these same state defendants indicated that all children with needs for more than 180 days could receive such educational services by being institutionalized in state mental retardation facilities. This assertion never addressed the dangers, harm or necessity of such institutionalization. They also seemed to assume that there could not be a group of mentally retarded children who could adequately live in the community but whose educational needs required services in the summer months.

Still later in the litigation these same state defendants altered their position to assert that they "permitted" local boards to establish voluntary programs in excess of 180 days. Yet the trial court found as a fact and the circuit court affirmed, that the state had denied children access to even these programs. The testimony of the state officials over a three year period of time never established or even suggested that the restrictive policy was due to an

"educational" decision. The clash between their earlier positions that they had no policies, their later position that their policies permitted extended services programs and their present position that they made an "educational decision" which excludes extended duration programs is not explained in the record, was not explained on appeal and is not explained in the instant petition.

The evidence and findings also do not support the state defendants' scenario of a battle of educational theories. The trial court weighed the credibility and demeanor of all the witnesses. It rejected the testimony of local defendant personnel that none of the children required more than 180 days. The state and local defendants presented a "study" which they asserted showed that the children in Chatham County did not need extended school services. The probative value of the study was rejected by the trial court because of its gross lack of validity and reliability. *GARC*, 511 F.Supp. at 1274. The study simply did not address the programs the children were actually receiving. (TR. 2704-06; 2780).

Contrary to the assertion in the petition of the state defendants, the principal expert witnesses for each side at the trial agreed on the use of *both* behavorial and developmental methods. (TR. 226; 2510). More vital to the instant petition, Dr. Turner, the defendants' principal expert, admitted that there is no foundation in educational theory to the limitation found in the 180-day program. (TR. 2717).

Also contrary to the assertion of the state defendants, the plaintiffs criticized many aspects of the educational services provided the children in Chatham County. (TR. 178-180; 815-816). Yet the focus of the case was that the

duration of the educational opportunities was insufficient to permit any reasonable progress for many severely retarded children. (E.g., PL. Ex. 20 at 44). Testimony of witnesses uniformly agreed that individual consideration of minimal program needs includes services of a duration in excess of 180 days. (TR. 164, 206, 3047-48).

The petitioners also each suggest that the Caine family is the only one which has stepped forward to request extended school year services. This again conflicts with the testimony at trial. (TR. 346-349; 529-532). This suggestion is also refuted by the numerous decisions of the state defendants in administrative hearings rejecting parents' claims for school services in excess of 180 days.

At trial the plaintiffs introduced evidence of decisions of the state defendants in which factual findings had been made that class members required more than 180 days of services in order for them to receive their "free appropriate public education". Such services were denied due to the state defendants' position that irrespective of the conclusions of the IEP process and of the administrative fact finding that such services would not be provided. *GARC,* 511 F.Supp. at 1270, n.5 and n.7. (See also, PL. Ex. Nos. 37, 90, 91, 92, 93 and 94). This is further supported by affidavits submitted by class members in opposition to an earlier motion to vacate the trial court order.

Further, the petitioners implied that the existing cost of their programs should limit their responsibility for services of adequate duration. The evidence of record indicates that resources were not an issue at the trial and that they were not a factor in limiting the available programs. The local defendants had large yearly budget sur-

pluses; the state defendants never utilized their entire allotment under Title VI-B of the EHA. Counsel for local defendants, while introducing cost estimates, expressly asserted to the court that it was not their position that they were without sufficient resources to provide programs. (TR. 1085). Moreover, the administrative decision in this case held that the available funding was not an issue or a permissible criterion in determining the placement of a child. (PL. Ex. 9 at 8-9). This ruling was never challenged by either party at the trial.

Finally, the defendants assert that the judgment should be vacated as moot due to the actions of the named individual plaintiffs. They do not analyze or explain that the actions taken by the Caine family concerning their move from Chatham County took place after the trial and after the entry of judgment in this case. Contrary to the assertions of the defendants, the trial record and nine affidavits demonstrate that other families in the state have been denied consideration for more than 180 days in the IEP processes.

REASONS FOR DENYING THE PETITIONS

A. Summary of the Argument

1. The decision of the Eleventh Circuit that individual consideration of children's special education needs requires a review of the duration of teaching opportunities is consistent with the EHA and with an unbroken line of decisions interpreting that Act. See, 20 U.S.C. §1401(19)(D). The holding is also consist-

ent with this Court's opinion in *Board of Education of Hendrick Hudson Central School District v. Rowley,* 458 U.S. 176, 102 S. Ct. 3034 (1982).

2. The entitlement to "appropriate educational" services is specific under federal law. This obligation has been voluntarily assumed by the State of Georgia and therefore, a finding which clarifies the procedural rights of children or construes the term "appropriate" does not conflict with *Pennhurst State School v. Halderman,* 451 U.S. 1 (1981).

3. The EHA is, in addition to a funding statute passed under the spending clause, an act passed pursuant to congress' authority under Section 5 of the Fourteenth Amendment. See, *Smith v. Robinson,* 468 U.S. —, 104 S. Ct. 3457 (1984). Thus the holding in *Pennhurst State School v. Halderman,* 451 U.S. 1 (1981) is inapposite and Congress has authority to require that an adequate duration of services be provided children.

4. The moving of several class representatives from the educational district of one set of defendants, occurring after class certification and after final judgment, does not by itself render moot the class claims against such defendants. Moreover, other class representatives, the class and the class representatives who moved their home into an adjoining county maintain claims against the state defendants.

5. A federal court's determination under the EHA that required due process procedures have been violated and its return of the children to the administrative decision-making process after enjoining the imper-

missible procedures, constituted a sufficient injury so as to support the relief as against an attack based upon Article III of the United States Constitution.

B. Argument

I.

Every Federal Court Reviewing the Special Education Requirements Has Held That School Services On A Yearly Basis Must Be Considered. These Holdings Are All Premised On The Requirement Of Individual Consideration Under The EHA.

(a) The Circuits agree that individual needs require the consideration of a child's duration of educational services.

The holdings of the district court and the Eleventh Circuit Court of Appeals are consistent with an unbroken chain of decisions concerning special education services. Prior to this Court's decision in *Board of Education of Hendrick Hudson Central School District v. Rowley,* 458 U.S. 176, 102 S. Ct. 3034 (1982) (hereinafter *"Rowley"*), courts had anticipated that ruling and its emphasis on the procedural process and on the individual needs of students. Courts permitted claims for schooling in excess of 180 or invalidated policies which restricted the consideration of these programs. These courts included: *Battle v. Pennsylvania,* 629 F.2d 269 (3rd Cir. 1980), *cert. denied,* 452 U.S. 968 (1980); *Anderson v. Thompson,* 495 F.Supp. 1256, 1265 (E.D. Wis. 1980), *aff'd on other grounds,* 658 F.2d 1205 (7th Cir. 1981); *Garrity v. Gallen,* 522 F.Supp.

171, 240 (D. N.H. 1980); *Lee v. Clark,* No. 80-0918 (D. Hawaii, Jan. 30 1981); *Moore v. Roberts,* No. LR-C-81-419 (E.D. Ark., July 24, 1981); and *Hilden v. Evans,* No. 80-511-RE (D. Oregon, Nov. 5, 1980). See discussion, *Yaris v. Special Sch. Dist. of St. Louis County,* 558 F.Supp. 545, 556-57 n.4 (E.D. Mo. 1983). Cf. *Bales v. Clark,* 523 F. Supp. 1366 (E.D. Va. 1981).

The federal courts which have reviewed this issue since *Rowley* all agree that a 180-day rule violates the EHA. *Crawford v. Pittman,* 708 F.2d 1028 (5th Cir. 1983); *Yaris v. Special Sch. Dist. of St. Louis County,* 558 F.Supp. 545 (E.D. Mo. 1983), *aff'd* 728 F.2d 1055 (8th Cir. 1984); and *Phipps v. New Hanover County Bd. of Education,* 551 F.Supp. 732 (E.D. N.C. 1982). Other states, in light of the litigation, have adopted flexible rules which permit more than 180 days. See, e.g., *Timms v. Metro School Dist. of Wabash County, Ind.,* 722 F.2d 1310, 1316 n.2, 1317 n.3 (7th Cir. 1983).

This consistency urges against certiorari. The petitioners have not cited a single case which holds that severely handicapped children should not have the duration of their educational programs based upon their individual needs. They have not shown any grounds under Rule 17 of this Court for granting this petition.

(b) The Court's holding is a required construction of the EHA.

The state and local defendants seem to assert that the district court and the trial court exceeded its authority in requiring that extended school year services be provided some children under the EHA. Though they acknowledge that the question is one of statutory construction, the ex-

plicit provisions of 20 U.S.C. § 1401(19) are not discussed. That section, in pertinent part, provides:

> *Section 1401* Definitions as used in this chapter—
>
> (16) The term "special education" means specially designed instruction . . . to meet the unique needs of a handicapped child . . .
>
> . . .
>
> (18) The term "free appropriate public education" means special education and related services which . . . (D) are provided in conformity with the individualized education program required under Section 1414(a)(5) of this Title.
>
> (19) The term "individualized education program" means a written statement for each handicapped child . . . which statement shall include . . . (C) a statement of the specific educational services to be provided to such child . . . (D) the projected date for initiation and anticipated duration of such services.

20 U.S.C. § 1401, Pub. L. 94-142, Section 4(a).

Thus the decisions below correctly require the consideration of the initiation and duration of services. This is required by the Act. It cannot be said that it is an expansive reading of the Act for a trial court to order that school districts procedurally adhere to this statutory provision.

(c) The holding in this case does not conflict with Rowley

In *Rowley* this court held that the federal courts may review actions of educational agencies to assure that the Act's procedural requirements have been followed and that the services provided the children are "individually de-

signed'' and reasonably calculated to enable the child to receive educational benefits. *Rowley,* 458 U.S. 176, 102 S. Ct. 3034 at 3048, 3051. The trial court in this case relied on this emphasis on the individual needs of students. It cited *Battle v. Pennsylvania,* 629 F.2d 269 (3rd Cir. 1980), *cert denied,* 452 U.S. 968 (1980) and held that the defendants' refusal to consider educational programs of more than 180 days was a procedural violation under the Act. The heart of its analysis was the following:

> The IEP is the key to determining which services a child needs and with what services he will be provided. . . .
>
> . . .
>
> . . . [T]he IEP is designed to consider a child's specific needs, including the development of reasonable goals and objectives for the child. . . . [T]he function of the IEP is to develop a plan of education appropriate to the particular needs of each handicapped child . . . [t]he Handicapped Act requires that full consideration be given to the individual education needs of each child in the development of a program for that child.

GARC, 511 F.Supp. at 1277.

In essence, the holdings below reason that the duty to provide appropriate programs to handicapped children may become more complex as their impairments increase. As this Court recognized in *Rowley,* the Act provides a methodology for making these determinations. It requires that goals and criteria for evaluating the educational program be placed in the child's IEP. The proper development of these goals and criteria are protected by the Act's extensive procedural requirements. If the goals are not achieved or if the child's condition regresses, then *Rowley*

teaches that prospective changes in the program may became necessary as school officials search for an appropriate program for the next school year. See also, *Battle v. Pennsylvania,* 629 F.2d 269, 276-277 n.9 (3rd Cir. 1980). One option open to school committees under the Act must be to analyze the duration of teaching opportunities available to children. The decision below held that this must occur on an individual basis and that the inflexibility of the 180-day rule violated these procedural requirements of the IEP process. The Eleventh Circuit as well as the Third, Fifth, Seventh and Eighth Circuits all agree in this analysis. The Circuit simply applied the rationale of *Rowley* to difficult decisions concerning severely impaired children.

II.

The Act Creates A Clear Entitlement To Appropriate Educational Services. This Right Does Not Abrogate The Holding In Pennhurst.

(a) The "Appropriate Education" is not an ambiguous standard.

This Court has decided in *Rowley* that the EHA creates enforceable rights. *Rowley,* 458 U.S. 176, 102 S. Ct. 3034 at 3048-49. See, *Irvington Independent School District v. Tatro,* 468 U.S. —, 104 S. Ct. 3371, 3377 (1984), citing *Rowley* at 458 U.S. 176, 192 (1982); *Smith v. Robinson,* 468 U.S. —, 104 S. Ct. 3457, 3464 n.6 and 3470-71 n.17 (1984). In spite of these holdings the petitioners utilize the "unambiguous" condition language in *Pennhurst State School v. Halderman,* 451 U.S. 1 (1981) (hereinafter "*Pennhurst*") to suggest that the Circuit erred. This reliance is misplaced.

It is clear from *Rowley* that the Act's requirement that the individual needs be determined by the IEP may impose an obligation to provide services which are not specifically delineated in the legislation. In an effort to provide flexibility to educational committees not every service which meets the mandate of "appropriate" or which is found within the definition of "special education" or "related services" is set forth in the Act. Thus, this Court in *Irvington Independent School District v. Tatro,* 468 U.S. —, 104 S. Ct. 3371 (1984) was able to order that catherization services could be required under the EHA as a related service even though the Act itself does not list it as a related service. In passing the EHA Congress created a right but chose not to identify each type of service which would be necessary. The focus was placed on the process and the child's progress. These requirements overcome the ambiguity argument.

Further, the court in *Pennhurst* cites *King v. Smith,* 392 U.S. 309 (1968) as an example of Congress' ability to impose an explicit condition on funds. *Pennhurst,* 451 U.S. 1 at 17-18. In *King* the issue was whether the definition of a "parent" which included the mother's paramour violated that funding statute. The Court held that the term "parent" was unambiguous and that services the state said they did not foresee could still be required based on a construction of that term. In this case Congress provided more notice than in *King* through its use of the word "appropriate". Congress put the state on notice that this term creates an entitlement to a range of services.

The record also demonsrates that the defendants understood that the term "appropriate" would include more than 180 days of school. This was expressly stated during

the administrative hearing process by officials of the state department. The state's plan contains provisions for IEPs of a year duration. Finally, it is undisputed that day programs for severely emotionally disturbed children in Georgia have been funded and provided in excess of 180 days.

(b) The petitions fail to analyze the impact of Smith v. Robinson.

The state and local defendants, address their *Pennhurst* argument as if the EHA is only a funding statute. They fail to analyze *Smith v. Robinson,* 468 U.S. —, 104 S. Ct. 3457 (1984).

In *Pennhurst* the Court held that Congress had not intended to impose enforceable obligations on the state through the adoption of 42 U.S.C. § 6010, the "bill of rights" section of the Developmentally Disabled Assistance and Bill of Rights Act of 1975, 42 U.S.C. §§ 6001-80. These holdings were based on three related factors: (1) there was no evidence that Congress intended to predicate the receipt of federal money on compliance with 42 U.S.C. § 6010; (2) § 6010 was not enacted under Section 5 of the Fourteenth Amendment; and (3) because 42 U.S.C. § 6010 was enacted under the Spending Clause of the Constitution, Congress had to impose any obligations on the grant of monies under the Act unambiguously, and it had failed to do so concerning that statute.

In the instant case, the petitioners do not question that Congress intended receipt of federal funds to be contingent on compliance with the Act. The question, in applying the *Pennhurst* rationale is whether the second and third factors are met.

The second *Pennhurst* consideration is whether the statute was enacted under Section 5 of the Fourteenth Amendment. If it was, then *Pennhurst* is inapposite and Congress would have the authority to impose obligations on the states to cure recognized constitutional deprivations.

In *Smith v. Robinson* this Court has held that the EHA was enacted pursuant to Congress' recognition of the equal protection violations that abounded in educational programs for handicapped children. The EHA is seen as a valid exercise of Congress' spending power as well as its power under the Fourteenth Amendment. That Court stated:

> The EHA was an attempt to relieve the fiscal burden placed on states and localities by their responsibility to provide education for all handicapped children. 20 U.S.C. §§ 1400(b)(a) and (9). At the same time, however, Congress made clear that EHA is not simply a funding statute. The responsibility for providing the required education remains on the states. S. Rep. No. 94-168, at 22. And the Act establishes an enforceable substantive right to a free and appropriate public education.

Smith v. Robinson, 104 S. Ct. at 3464.

Thus, the Act derives its authority from a source other than the spending clause. The analysis in *Pennhurst* is not applicable.

III.

The Plaintiff Class Presents A Live and Justiciable Controversy.

(a) The case is not moot against the defendants.

After the entry of judgment one of the named class representatives moved from the local defendants' county.

This child is still of school age, is still mentally retarded and still has a right to a free and appropriate public education. His individual claims against the state defendants still exist. The trial court and the district court's determinations concerning the state defendants should not be vacated as moot.

The mooting of his individual claims against the local defendants after certification of the class and after judgment does not render the action moot. *United States Parole Commission v. Geraghty,* 445 U.S. 380 (1980). Further, Russell Caine and the Association may still represent class claims against the local defendants as they continue to "fairly and adequately protect the interests of the class." *Id.* at 405, 406-407, quoting *Sosna v. Iowa,* 419 U.S. 393, 403 (1975). See, *Califano v. Yamasaki,* 442 U.S. 682 (1979).

The assertion that other class members have not exhausted the administrative process is not dispositive of the mootness issue. It is well settled in other areas that where Congress created jurisdictional prerequisites to suit that non-exhausting individuals may later maintain the action and seek relief. See, *Albermarle Paper Company v. Moody,* 422 U.S. 405 (1975); *Romasanta v. United Airlines, Inc.,* 537 F.2d 915 (7th Cir. 1976), *aff'd sub nom, United Airlines, Inc. v. McDonald,* 432 U.S. 385 (1977).

Other families (and class members) had their rights to more than 180 days of services denied. In some instances there had been fact findings in the administrative process that the children's individual needs required such services. The trial court found these violations as "procedural". Continued exhaustion of an allegedly unfair administrative procedure would be futile or inadequate.

This Court in *Smith v. Robinson*, at 104 S. Ct. 3457, 3470-71 n.17 recognized the strong line of cases which permit judicial review of EHA claims if it is alleged that the administrative process was unfair or if exhaustion would be futile or inadequate. The *Smith* Court cited *Armstrong v. Kline*, 476 F.Supp. 583, 601-602 (E.D. Pa. 1979) *aff'd and remanded on other grounds sub nom, Battle v. Pennsylvania*, 629 F.2d 269 (3rd Cir. 1980), *cert denied*, 452 U.S. 968 (1981) as being an example of these holdings. That case presented a situation where severely handicapped children, without anyone exhausting the administrative process, attacked the procedural infirmities in the IEP process which limited the consideration of the duration of their programs. Due to the inflexibility of the 180-day policy they were permitted to proceed with their claims.

The individual claims against the state defendants and the class claims against both the state and local defendants are alive and are justiciable controversies. The judgment should not be vacated as moot. The effect of doing so would be to restore the invalid policy and remit the class children to an administrative procedure which has been found in violation of the Act.

(b) The Circuit affirmed relief to real litigants.

The petitioners also suggest that the trial court opinion was advisory and should be vacated. To the contrary, the relief afforded respondents was limited by the trial court to minimize judicial intrusion into educational decisions. Anticipating *Rowley*, the District Court found that defendants had violated the procedural requirements of the

Act. It enjoined the impermissible policy and returned all of the plaintiff children to the IEP process for reconsideration of their needs. This relief was structured to make as limited an intrusion on educational agencies as necessary.

The adjudication of procedural violations is the essence of *Rowley*. The integrity of the IEP decision-making process is the foundation upon which all the other rights granted children and their families under the EHA rest. The trial court's findings in this case show that the impairment produced a legally cognizable injury, *Baker v. Carr*, 369 U.S. 186, 208 (1962), and the relief went to the heart of the children's entitlement: a fair, unbiased individual education plan. See, *Califano v. Yamasaki*, 442 U.S. 682 (1979).

The injury found below was that both defendants injected a policy which violated the Act into the decision-making process. The result was that no children were provided the services and in the limited instances where parents were aware of their rights and prevailed on the merits, these holdings were overturned by the state. These actions injured each of those individuals and the policy was an injury to the class as a whole. The fact that the trial court declined to order an affirmative injunction providing Russell Caine with extended school year services does not make the judgment an advisory opinion.

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CONCLUSION

Respondents strongly resist certiorari. The lower courts are in agreement. The relief afforded plaintiffs speaks of a careful and limited role of the trial court. The courts below correctly analyzed the procedures used under the EHA and found them wanting. They then returned the plaintiff and the class members to the IEP process for a review of their needs. Finally, the petitioners fail to analyze the import of this Court's determination that the EHA was passed to secure children's constitutional rights.

Respectfully submitted,

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